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MICHAEL RODAK, JR.

IN THE

Supreme Court of The United States

OF AMERICA

OCTOBER TERM, 1972

No.

JESSE BACON SMITH

Petitioner

vs.

COMMONWEALTH OF VIRGINIA

Petition for a Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

~~BRIEF FOR THE PETITIONER~~

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Petition for a Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

BRIEF FOR THE PETITIONER

OPINIONS BELOW

There were no reports of the trial court's decisions.

The rejection of the Petition for Writ of Error has not been reported. A copy of said rejection of the Petition for Writ of Error is annexed as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Appeals for the Commonwealth of Virginia was entered on the 14th day of August, 1972; there were no petitions for rehearing and no orders granting an extension of time in which to petition for a Writ of Certiorari.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., § 1257 (3).

QUESTIONS PRESENTED

I. Can the State suppress psychiatric testimony under the guise of a physician-patient privilege where the psychiatrist is treating a thirteen-year-old boy who is the primary witness against the accused in a criminal action alleging acts of sodomy?

II. Is it a denial of due process to hold in a felony prosecution an unrecorded hearing at which neither the accused nor his counsel is present wherein a subpoena issued on behalf of the accused to a psychiatrist is quashed?

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, Constitution of the United States:

> "No person shall be heard to answer for capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is a criminal action charging the defendant, a white, forty-six-year-old male and manager of a supermarket in Virginia Beach, Virginia, with sodomy, both oral and rectal, Virginia Code § 18.1-212 of the 1950 Code of Virginia, as amended. on a thirteen-year-old boy, a resident of Virginia Beach. The case was tried before a jury on the 27th day of October, 1971, Honorable Paul W. Ackiss, Judge, presiding.

On behalf of the accused, a subpoena had been issued to a psychiatrist who had treated the complaining witness. On the day prior to trial, a hearing was held in the Judge's chambers at which this subpoena was quashed. The basis for quashing the subpoena was that a letter from the psychiatrist asking not to appear was considered a motion by him to quash the subpoena. Neither the accused nor his counsel appeared at this hearing. This hearing, in which the subpoena was quashed, was unrecorded.

Immediately prior to trial, counsel for the accused entered his objections as follows, Transcript pages 5-6:

> "That all occurred prior to these alleged incidents and warrant the testimony of Doctor Abdou, and to rule otherwise would be the quintescence of non-disclosure of a complaining witness—by a complaining witness whose competency is in issue. And further, to negate the testimony to keep out the testimony of Doctor Abdou would abridge the defendant's constitutional rights."

Transcript, pages 7-8:

> "And Judge, I would therefore move that Doctor Abdou be required to obey his subpoena as Number 1;

testify, and Number 2: Inasmuch as Doctor Abdou is not here and delayed here yesterday, it was moved to quash the subpoena; and I might say that I was notified by letter from the Circuit Court, City of Virginia Beach a day hence at which time I replied that I couldn't be here because of prior trials in the Corporation Court, City of Norfolk. I would have tried to get here later that afternoon if the court asked me to come down.

* * *

". . . I was unable to be here on the very limited notice that I was given. Of course, the limited notice cannot be helped because Doctor Abdou, as the record will show, has been subpoenaed for weeks and weeks prior to this trial and have only recently decided to write the Court—a letter to the Court from Doctor Abdou and the Court adopted to treat it as a motion to quash the subpoena."

The Court overruled these objections of counsel, to which there was entered an exception by counsel.

Transcript, pages 11-12:

"Now, Mr. Bashara—and the Court ruled yesterday that Doctor Abdou is not necessary. He has a privileged communication and we are going to uphold it. We take that same position.

THE COURT: The Court has already ruled upon it.

MR. BASHARA: Note my exception."

* * *

Transcript, page 12:

"THE COURT: You except to the ruling of Judge Vakos?

MR. BASHARA: I do except to the ruling of the Court."

This issue was presented to the Supreme Court of Appeals of Virginia in the accused's Petition for a Writ of Error as Question Involved, number 1, which set forth the following:

> "I. Did the Court err in ruling that a duly subpoenaed witness, Dr. Fathy Abdou, did not have to testify when privilege was not claimed by the doctor nor the complaining witness who was in fact the patient of the said doctor?"

The issue of neither the accused nor his counsel being present at the hearing in which the subpoena for the psychiatrist was quashed was not presented in the Petition for Writ of Error to the Supreme Court of Appeals of Virginia.

ARGUMENT

> I. "Can the State suppress psychiatric testimony under the guise of a physician-patient privilege where the psychiatrist is treating a thirteen-year-old boy who is the primary witness against the accused in a criminal action alleging acts of sodomy?"

It is now well settled that the State, in a criminal action, cannot suppress evidence which may be favorable to the accused. *Giglio* v. *United States*, 405 U.S. 150, 3 L.Ed. 2d 104, 92 S.Ct. 763; *Giles* v. *Maryland*, 386 U.S. 66; *Brady* v. *Maryland*, 373 U.S. 83.

The issue squarely presented in this petition is whether the State, under the guise of the physician-patient privilege, can suppress evidence which may be favorable to the accused?

The threshold question is whether the State of Virginia has a physician-patient privilege which applies to criminal actions as there was no physician-patient privilege at common law, See *Jones on Evidence*, 5th Ed., Vol. 3, § 838, page 1573; *Wharton's Criminal Evidence*, 12th Ed., Vol. 3, § 816, page 166, and as only two-thirds of the States have provided for this privilege by legislation, *Wigmore on Evidence*, McNaughton revision, Vol. 8, § 2380, page 820.

The legislation within the State of Virginia regarding physicians and patients is set forth in § 8-289.1 of the 1950 Code of Virginia, as follows:

> "Except at the request of, or with the consent of, the patient, no duly licensed practitioner of any branch of the healing arts shall be required to testify in any civil action, suit or proceeding at law on in equity respecting any information which he may have acquired in attending, examining or treating the patient in a professional capacity if such information was necessary to enable him to furnish professional care to the patient; provided, however, that when the physical or mental condition of the patient is at issue in such action, suit or proceeding or when a judge of a court of record, in the exercise of sound discretion, deems such disclosure necessary to the proper administration of justice, no fact communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be privileged and disclosure may be required. This section shall not be construed to repeal or otherwise affect the provisions of § 65-88 relating to privileged communication between physicians and surgeons and employees under the Workmen's Compensation Act; nor shall the provisions of this section apply to information communicated to any such practitioner in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug. A clinical psychologist duly licensed under the provisions of § 54-309.1 shall be considered a practitioner of a branch of the healing arts within the meaning of this section."

In determining this issue of whether the State of Virginia has provided a physician-patient privilege which applies in criminal actions, the above language is important in that the privilege applies ". . . in any civil action, suit or proceeding at law or in equity."

The issue as to whether this privilege applies in a criminal action has not been decided by the highest court of Virginia. There is a split of opinion as to whether or not this language, or language similar, has the privilege apply in a criminal action. See 7 A.L.R. 3d Physician-Patient Privilege, § 2, applicable, pages 1460-1463, § 3, not applicable, pages 1463-1466. However, I do not believe it is necessary for this court to determine this issue. If the physician-patient privilege as enacted by Virginia does not apply to a criminal action, then the court erred in suppressing the evidence in question. If, for the sake of argument, the privilege does apply in a criminal action, then the exception therein, where it is "... necessary to the proper administration of justice" should be applicable.

It has been held in the State of Virginia, that where a patient's mental or physical condition is in issue, in a tort action for the recovery of money then the privilege does not apply. *Portsmouth* v. *Cilumbrello*, 204 Va. 11, 129 S.E.2d, 31; *Petition of Trinidad Corporation* 238 F.Supp. 928; *DeFoe* v. *Duhl*, 286 F.2d 205.

In addition to the exception where the physical condition is in issue in regards to a monetary recovery, the statute expressly excepts medical evidence under the Workmen's Compensation Act and regarding a narcotic drug. These exceptions are generally included in the States having the physician-patient privilege, and in addition, those states having the privilege generally have exceptions to the physician-patient privilege where venereal disease or child abuse is concerned. See *Wigmore on Evidence*, Supra § 2380, page 827. The State of Virginia has expressly repealed the physician-patient privilege in regard to child abuse, § 16.1-217.4, 1950 Code of Virginia, as amended, and also requires physicians to report as to venereal disease, § 32-91 of the 1950 Code of Virginia, as amended.

In addition to the above set out exceptions, it has been held that the testimony of a psychiatrist is not privileged in criminal actions where it conflicts with the interest of public justice; *Douglas* v. *United States*, 239 F.2d 52, 99 U.S.App.

D.C. 232; or where the physician's testimony is necessary to prevent injustice, *Cowen* v. *Cowen*, 125 Misc. 755, 211 N.Y. 840; and, the testimony is taken out of physician-patient privilege when it is necessary for the proper administration of justice, *State* v. *Howard*, 272 N.C. 519, 158 S.E.2d 350.

Under the facts of the instant case, the testimony of the psychiatrist treating the complaining thirteen-year-old witness was necessary to the proper administration of justice. The complaining witness's father testified that while he was beating the complaining witness with a belt for not staying at home, he admitted to the alleged acts. This all took place some months after the alleged acts occurred. (Transcript, pages 37-40)

The complaining witness testified as to the alleged acts of sodomy performed with the accused. The accused took the stand and denied any acts of sodomy, or any improper acts, with the complaining witness. Thus, the issue of the credibility of the complaining witness was directly presented to the jury for determination.

The credibility of the complaining witness was further put into issue when the complaining witness's father was allowed to testify that he sent his son to a psychiatrist only because the son was hyperkinetic and was further allowed to testify that a hyperkinetic child meant only that he was a very active child. (Transcript, pages 45-46)

Even though the credibility of the complaining witness was directly put into issue and the father was allowed to testify that the complaining witness had been seeing a psychiatrist with a diagnosis of a hyperkinetic child meaning only that he was hyperactive, the accused was deprived of the opportunity of having the psychiatrist testify as to whether the accused was also hyperimaginative, living partially in a dream world, or could be believed under oath. For these reasons, it is submitted that the court deprived the accused of the equal protection of the law by suppressing the disclosures of the psychiatrist where it was necessary to the proper administration of justice.

It is submitted that if the physician-patient privilege applies in a criminal action, then this case was squarely within the exception therein. Therefore, the accused was denied his constitutional right by the suppression of evidence that may have been favorable to him.

II. "Is it a denial of due process to hold in a felony prosecution an unrecorded hearing at which neither the accused nor his counsel is present wherein a subpoena issued on behalf of the accused to a psychiatrist is quashed?"

It is a leading principle that pervades the entire law of criminal procedure that after an indictment nothing shall be done in the absence of the accused. *Lewis* v. *United States*, 146 U.S. 370, 13 S.Ct. 136, 36 L. Ed. 1011 (challenging jury panel); *United States* v. *Behrens*, 375 U.S. 162, 84 S.Ct., 295, 11 L. Ed. 2d 224 (affixing final sentence under 18 U.S.C. § 4208 (b). The rule of law is well established within the jurisprudence of the State of Virginia and was explained in *Palmer* v. *Commonwealth*, 143 Va. 592, 130 S.E. 398, where it was said:

". . . Generally stated, the rule is that he must be present on his arraignment, when any evidence is given or excluded, when the jury is charged, when the trial court wishes to communicate with the jury in answering questions by them, and when the jury receives further instructions. He must be present at every stage of the trial proper."

The above language was quoted with approval in the recent case of *Lewis* v. *Commonwealth*, 212 Va. 411, 184 S.E.2d 818, where the jury, after it retired, requested the court for further evidence, and the court sent back a written instruction to the effect that the jury must base its verdict on the evidence and instructions before it.

While it is not completely clear as the hearing at which the subpoena for the psychiatrist was quashed was not recorded, it can be gleaned from the objection of trial counsel that neither

he nor the accused was present at the quashing of the subpoena. Although counsel did not present this issue to the Supreme Court of Appeals of Virginia, it is submitted that the right to be present either in person or by counsel at every stage of the trial is such an important and basic constitutional right, that this court should recognize this error at this stage.

CONCLUSION

From the foregoing, it is submitted that the State, and prosecutor, cannot suppress evidence which may be favorable to the accused under the guise of a physician-patient relationship, and so to do deprives the accused of his constitutional right to the equal protection of the law. In addition, the right to be present at all stages of the trial is such a fundamental and basic right that the denial thereof should be recognized at this stage. Therefore, this Petition for Certiorari should be granted as the issue of whether the physician-patient privilege applies as to a witness in a criminal action has not been previously decided and is of fundamental importance in criminal jurisprudence.

Respectfully submitted,

Calvin H. Childress
Counsel for the Accused

CALVIN H. CHILDRESS, ESQ. of
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Norfolk, Virginia 23510

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 14th day of August, 1972.

The petition of Jesse Bacon Smith for a writ of error and supersedeas to judgments rendered by the Circuit Court of the City of Virginia Beach on the 27th day of October, 1971, in prosecutions by the Commonwealth against the said petitioner for felonies (Indictment for Sodomy - Counts Nos. 1 and 2), having been maturely considered and a transcript of the record of the judgments aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgments complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgments of the said court.

Upon further consideration whereof, it is ordered that the said circuit court enter appropriate orders, *nunc pro tunc* as of October 27, 1971, to set forth the sentencing of the plaintiff in error on each of the counts in the indictment based on the verdicts of the jury in accordance with the directions of the court as set out in the transcript of testimony and incidents of the trial of this case.

It is further ordered that the said circuit court allow court-appointed counsel the sum of $150 as compensation for services rendered on this appeal, and also his necessary direct out-of-pocket expenses.

And it is further ordered that the Commonwealth recover of the plaintiff in error the said amount paid counsel appointed to represent him on this appeal, his necessary direct out-of-pocket expenses, the costs to be taxed by the clerk of this

court, and the costs to be assessed in this case by the clerk of the court below, if any.

A Copy,

Teste:

Howard G. Turner, Clerk

By:

Allen L. Lucy, Deputy Clerk

Costs due the Commonwealth by plaintiff in error in Supreme Court of Virginia:

Attorney's fee	$150.00 plus his costs and expenses
Filing fee	1.50

Teste:

Howard G. Turner, Clerk

By:

Allen L. Lucy, Deputy Clerk

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Supreme Court of the United States

October Term, 1972

No. 72-713

JESSE BACON SMITH,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

There is no reported opinion of the Supreme Court of Virginia. The Order rejecting the Petition for Writ of Error is set forth in the Petition for Writ of Certiorari as Appendix A.

JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257 (3).

STATEMENT OF THE CASE

On the day prior to Petitioner's trial, the trial court ruled that a psychiatrist subpoenaed by Petitioner was an unnecessary witness. The exact nature and basis of the trial

court's ruling is unclear as there is no record of the hearing nor was any order entered specifying the reasons for the action.

At the trial Petitioner took exception to the trial court's ruling regarding the witness upon the generalized ground that such action would abridge the petitioner's constitutional rights. Transcript pages 5-6.

At the conclusion of trial Petitioner made the following assignments of error:

> 1. That the Court erred in not ruling that Dr. Fathy A. Abdou did not have to testify after having been duly subpoenaed by the defendant, privilege not being claimed.
>
> 2. That the Commonwealth used inflammatory remarks to the jury.
>
> 3. That the defendant was denied a preliminary hearing.
>
> 4. That the verdict of the jury and the judgment of the Court was contrary to the law and evidence.

The above assignments of error were presented to the Supreme Court of Virginia in a Petition for Writ of Error. The argument which was submitted to the Virginia Supreme Court in relation to assignment of error No. 1 above is set forth in its entirety below:

> I. Based On The Law And Evidence The Court Erred In Ruling That Dr. Fathy Abdou Did Not Have To Testify When He Had Been Lawfully And Regularly Subpoenaed Within The Rules Of Court.
>
> Virginia Code Section 8-289.1 of the 1950 Code of Virginia, as Amended, codifies the law generally accepted in a majority of jurisdictions that a physician or psychiatrist cannot be excused on the grounds of privilege when in fact privilege is not claimed by either the

physician, psychiatrist or patient. Further that a physician or psychiatrist should not be excused, irrespective of the claim of privilege, when the patient's competency and ability to testify is in direct dispute and is an issue in a legal proceeding. See *Portsmouth* v. *Cilumbrello,* 204 Va. 11, 129 S.E.2d 31, *Petition of Trinidad Corporation,* 238 Fed. Sup. 928 (e.d. Va. 1965). Therefore, under the law it clearly appears that not only the mental but the physical condition of Stuart D. Hall, the complaining witness at this trial, was in issue and the Court erred in quashing the subpoena of Dr. Fathy Abdou.

The issue being raised by Petitioner that neither the petitioner nor his counsel was at the hearing at which the trial court ruled that the psychiatrist was an unnecessary witness was not raised at trial nor assigned as error in the Supreme Court of Virginia, and is being raised in this Court for the first time. See Petition for Writ of Certiorari page 5.

ARGUMENT AGAINST GRANTING CERTIORARI

It was very early established that the United States Supreme Court would not decide federal constitutional issues raised in the Supreme Court for the first time on review of state court decisions. *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969).

The rationale underlying this Court's policy of refusing to review issues raised for the first time in this Court is that in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, *Cardinale, supra,* and to assure that this Court would have an adequate record before it prior to rendering decisions of constitutional magnitude. *Hill* v. *California,* 401 U.S. 797

(1971). To same effect see *Rugendorf* v. *United States*, 376 U.S. 528 (1964).

When a comparison is made of the issues raised in the Supreme Court of Virginia with those being raised in this Court, it becomes apparent that Petitioner is raising issues for the first time in this Court. The issue that due process was denied when neither petitioner nor his counsel was present at a hearing when a subpoena issued on behalf of the petitioner was quashed has never been raised in the Virginia courts. A review of the errors assigned and argument presented to the Virginia Supreme Court clearly reveal that at no time was the Virginia Supreme Court called upon to determine the constitutionality of § 8-289.1 of the Code of Virginia, which provides for a physician-patient privilege.

The Virginia Supreme Court has consistently held that it will not notice any objection requiring a ruling of the trial court unless the ground of objection was stated with reasonable certainty at the time of the ruling, and that only errors assigned will be ruled upon. Rule 5:7, Rules of the Supreme Court of Virginia; *Clarendon House* v. *Helfert*, 213 Va. 28 (1972); *Rice* v. *Commonwealth*, 212 Va. 778 (1972); *Manley* v. *Commonwealth*, 211 Va. 146 (1970).

In *Beck* v. *Washington*, 369 U.S. 541 (1962), the defendant claimed that the Washington statute permitting persons in custody to challenge grand jurors denied equal protection to persons not in custody who were investigated by grand juries. In refusing to rule upon this issue this court said, "[t]his point is not properly before this Court. Although both opinions of the Washington Supreme Court discuss the interpretation of § 10.28.030, neither considered that question in light of the equal protection argument for that argument was never properly presented to the court in relation to this statute." 369 U.S. at 549, 550.

Clearly, the ground of objection to the trial court's action in quashing the subpoena was not stated with reasonable certainty as required by the Virginia Supreme Court rules, nor was any argument made to the Virginia Supreme Court that the trial court's action amounted to the State, under the guise of the physician-patient privilege, suppressing evidence which might be favorable to the petitioner. See Petition for Writ of Certiorari, page 5.

The Commonwealth submits that the Virginia Supreme Court has not been given an opportunity to provide a definitive interpretation of § 8-289.1, Code of Virginia, and that the jurisdiction of this Court cannot rest upon 28 U.S.C. § 1257 (3) since the validity of a State Statute has never been drawn in question on the ground of its being repugnant to the Constitution or laws of the United States. See also Rule 19, Rules of the Supreme Court of the United States.

CONCLUSION

For the foregoing reasons the Commonwealth of Virginia submits that there is no adequate record before this Court upon which to decide the issues raised, and that this Court should not exercise jurisdiction over issues of such magnitude when the Virginia Courts have not passed upon them. Therefore, the Petition for Writ of Certiorari should be denied.

ANDREW P. MILLER
Attorney General of Virginia

JAMES E. KULP
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

This is to certify that I, James E. Kulp, Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and I have mailed three (3) copies of this Brief in Opposition to Calvin H. Childress, 807 Plaza One Building, Norfolk, Virginia 23510, counsel for Petitioner, on or before February 5, 1973.

JAMES E. KULP
Assistant Attorney General